Supreme Court, U.S.
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No. 94-1168

In The

Supreme Court of the United States

October Term, 1994

MARY ANN VANCE,

Petitioner,

vs.

SOUTHERN BELL TELEPHONE & TELEGRAPH COMPANY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATUTES INVOLVED

Section 1 of the Civil Rights Act of 1866 provides:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses and exactions of every kind, and to no other.

R.S. § 1977, 14 Stat. 27 (formerly codified as 42 U.S.C.A. § 1981 (West 1981)).

The Civil Rights Act of 1991 amended § 1981 as follows:

> For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

Pub. L. 102-166, § 101, 105 Stat. 1071 (codified as 42 U.S.C. § 1981(b) (1994)).

REASONS FOR DENYING THE WRIT

Respondent, Southern Bell Telephone & Telegraph Company,[1] respectfully submits that the Petition for Writ of Certiorari (hereinafter referred to as the Petition), which seeks review of the decision of the United States Court of Appeals for the Eleventh Circuit in *Vance v. Southern Bell Telephone & Telegraph Co.*, 983 F.2d 1573 (11th Cir. 1993), should be denied.

I. THIS CASE DOES NOT PRESENT THE "SPECIAL AND IMPORTANT REASONS" REQUIRED TO INVOKE THE DISCRETIONARY JURISDICTION OF THIS COURT.

Petitioner fails to demonstrate any compelling reason for this Court's exercise of its discretionary jurisdiction. According to the Rules of the Supreme Court,

> review on writ of certiorari is not a matter of right, but of judicial discretion. . . . [and] will be granted only when there are special and important reasons therefor.

Sup. Ct. R. 10.1. Examples of such "special and important reasons" include "conflicts among the Circuit Courts of Appeals and state courts concerning the meaning of provisions of federal law," *Braxton v. United States*, 500 U.S. 344, 347 (1991), and decisions of state or federal courts on "important question[s] of federal law" that have not yet

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[1] Respondent, Southern Bell Telephone & Telegraph Company ("Southern Bell") appeared as Defendant/Appellant below. Petitioner, Mary Ann Vance, appeared as Plaintiff/Appellee below.

been settled or decisions on federal questions that conflict with the established law of this Court. Sup. Ct. R. 10.1(c).

No such "special and important reasons" exist in this case. Neither the retroactive application of *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), nor the directed verdict entered against Petitioner on her state law tort claim deprives Petitioner of her constitutional rights under the Fifth and Seventh Amendments. Indeed, the Eleventh Circuit's decision in *Vance* is consistent with decisions rendered by the state courts of Florida, the federal circuit courts of appeal, and the United States Supreme Court itself. Without "special and important reasons therefor," the Petition for Writ of Certiorari sought in this case must be denied. Sup. Ct. R. 10.1.

II. THE ELEVENTH CIRCUIT CORRECTLY CONSTRUED § 1981 – AS ORIGINALLY ENACTED AND AS INTERPRETED IN *PATTERSON* – TO BAR PETITIONER'S RACIAL HARASSMENT CLAIMS.

Petitioner argues that the Eleventh Circuit mistakenly relied upon *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), to bar her racial harassment claims under § 1981. She contends that the Eleventh Circuit has erroneously applied a decision that was not the law "at the time the wrongs occurred in 1984, at the time of Southern Bell's first conviction in 1987[,] . . . at the time of the first appellate mandate in 1989. . . . [or] at the time of the second appellate mandate in February of 1993." Petition at 5. Petitioner concludes, then, by asserting that the Eleventh Circuit's retroactive application in *Patterson* –

despite the "pre-*Patterson* prohibition of racial harassment" and the subsequent "statutory nullification of the [*Patterson*] decision" by the Civil Rights Act of 1991 – results in a "manifest injustice" to Petitioner. Petition at 5-8.

Petitioner's argument is seriously flawed. Not only does she misinterpret law relating to claims based upon allegations of racial harassment (specifically, 42 U.S.C. § 1981) in existence before 1991, she also misconstrues the effect of Congress' enactment of the Civil Rights Act of 1991 upon the *Patterson* decision. This Court, in *Rivers v. Roadway Express, Inc.*, 114 S. Ct. 1510 (1994), has very recently considered – and rejected – each of the arguments advanced by the Petitioner. The *Roadway Express* opinion confirms that the Eleventh Circuit did not make the wrong "choice of law," as Petitioner contends, but instead properly relied upon § 1981 – as originally enacted and interpreted in *Patterson* – to bar Petitioner's racial discrimination claims.

A. Petitioner misinterprets the "pre-*Patterson* prohibition of racial harassment" under § 1981.

Petitioner first assumes that, "at the time the wrongs occurred in 1984," § 1981 prohibited post-contract formation racial harassment and discrimination of the kind that she allegedly suffered. Petition at 5. Yet even before the Supreme Court decided *Patterson*, § 1981 did not prohibit discriminatory conduct occurring after contract formation, such as the post-hiring racial harassment, discriminatory denial of transfer, and constructive discharge asserted by Vance. Rather, § 1981 simply provided remedies for racial discrimination in the "mak[ing] and

enforce[ment] of contracts." 42 U.S.C.A. § 1981 (West 1981). Petitioner's construction of the "pre-*Patterson*" version of § 1981, then, contradicts the plain language of the statute itself.

B. *Patterson* did not enact a new rule of statutory interpretation, but simply corrected earlier interpretations of § 1981.

Petitioner not only ignores the plain language of § 1981, she asserts that she somehow relied upon the "pre-*Patterson* prohibition of racial harassment," as if to suggest that the *Patterson* opinion itself changed the scope of § 1981. *See* Petition at 5. Contrary to Petitioner's suggestions, *Patterson* simply clarified the statute's *existing* limitations.

In interpreting § 1981, the *Patterson* Court noted that the statute's "most obvious feature" was "the restriction of its scope to . . . discrimination in the 'mak[ing] and enforce[ment]' of contracts alone." 491 U.S. 164, 176. Accordingly, the Court emphasized that

> racial harassment relating to the conditions of employment is not actionable under § 1981 because that provision does not apply to conduct which occurs after the formation of a contract and which does not interfere with the right to enforce established contract obligations.

Id. at 171.

Although the *Patterson* decision may have contradicted the interpretation given to § 1981 by certain federal courts, the rule announced by the Court was not a

new one. *See Rivers v. Roadway Express, Inc.*, 114 S. Ct. at 1519. As this Court explained in *Roadway Express:*

> *Patterson* did not overrule any prior decision of this Court; rather, it held and therefore established that the prior decisions of the Courts of Appeals which read § 1981 to cover discriminatory contract termination were *incorrect.*

Id. Petitioner cannot assert, then, that the Eleventh Circuit erred when it chose not to rely upon the "pre-*Patterson* prohibition of racial harassment." Section 1981 – even before *Patterson* – did not encompass the discriminatory conduct allegedly committed by Southern Bell. *See Roadway Express,* 114 S. Ct. at 1513, 1519; *Patterson,* 491 U.S. at 176.

C. Even assuming that *Patterson* did announce a new interpretation of § 1981, the Eleventh Circuit did not err in finding that *Beam* required retroactive application of *Patterson* to the facts of this case.

The Eleventh Circuit did not have the benefit of the *Roadway Express* opinion in deciding *Vance,* but properly concluded that *Patterson* simply declared what § 1981 had always meant. *See Vance,* 983 F.2d at 1576-77. Notwithstanding its conclusion, the Eleventh Circuit went a step further, assuming – for the sake of argument – that *Patterson* had announced a new rule. *See id.* Even under this analysis, the *Vance* court determined that another recent decision of the Court, *James B. Beam Distilling Co. v. Georgia,* 501 U.S. 529 (1991), "command[ed] retroactive application of *Patterson*" to bar the Petitioner's § 1981 claims. 983 F.2d at 1576.

In *Beam* the Court found that "it is error to refuse to apply a rule of federal law retroactively after the case announcing the rule has already done so." 501 U.S. at 540. The question before the court in *Vance*, then, was "whether the *Patterson* court applied its interpretation of section 1981's 'make and enforce' language to the parties in the *Patterson* case." 983 F.2d at 1576. Because the *Patterson* Court had applied its interpretation of § 1981 to the litigants in that case, the Eleventh Circuit reasoned that the *Patterson* interpretation of § 1981 governed all pending cases, including *Vance*. *See Vance*, 983 F.2d at 1576-77.

Petitioner attacks the Eleventh Circuit's reliance on *Beam*, characterizing the decision as yet "another intervening decision of the Supreme Court . . . which did not exist during any of the trial court proceedings." Petition at 5. In criticizing the *Vance* court's interpretation of *Beam* – and in suggesting that *Patterson* should not have been retroactively applied – Petitioner ignores the very principles of equality and stare decisis emphasized by this Court in *Beam*, 501 U.S. at 543,[2] as well as the recent ruling of this Court in *Roadway Express*. Moreover, the fact that the *Beam* decision "did not exist during any of the trial court proceedings" is simply not relevant: "an appellate court must apply the law in effect at the time it

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[2] As the *Beam* Court stated:

> Once retroactive application is chosen for any assertedly new rule, it is chosen for all others who might seek its prospective application. The applicability of rules of law are not to be switched on and off according to individual hardship. . . .

501 U.S. at 543.

renders its decision,"[3] not the law in effect when the case is tried. Petitioner fails to demonstrate any error in the Eleventh Circuit's reasoning.

D. *Patterson* remains valid law even after the enactment of the Civil Rights Act of 1991.

Petitioner next argues that Congress' enactment of the Civil Rights Act of 1991 effectively "nullified" the *Patterson* decision, and concludes that "*Patterson* was . . . not the law at the time of the second appellate mandate in February of 1993." Petition at 5. Petitioner once again cannot demonstrate that the Eleventh Circuit has erred in its interpretation and application of the governing law.

In 1991 Congress amended § 1981 to prohibit discrimination not only in the "making and enforcement" of contracts, but also in

> the . . . performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

Civil Rights Act of 1991, Pub. L. No. 102-166, § 101, 105 Stat. 1071 (codified as 42 U.S.C. § 1981(b)). Although the 1991 amendments did expand the scope of prohibited conduct, this legislative response to *Patterson*

> does not necessarily indicate that Congress viewed the judicial decision as "wrongly decided" as an interpretive matter.

Roadway Express, 114 S. Ct. at 1515.

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[3] *Bradley v. School Board of Richmond*, 416 U.S. 696, 714 (1974) (quoting *Thorpe v. Housing Auth. of City of Durham*, 393 U.S. 268, 281 (1969)).

No matter what Congress' view of the Supreme Court's decision in *Patterson*, the Civil Rights Act of 1991 does not clearly evidence any legislative intent to reach cases arising *before* its enactment. *See id.* at 1515-16. Because the 1991 amendment applies only to claims arising after November 21, 1991, the effective date of the statute,[4] Congress' enactment of the Civil Rights Act of 1991 did not in any way "nullify" the effect of *Patterson*. *Patterson* continues to

> provide[] the authoritative interpretation of the phrase "make and enforce contracts" in the Civil Rights Act of 1866 before the 1991 amendment went into effect on November 21, 1991.

114 S. Ct. at 1519.

The Eleventh Circuit did not have the benefit of the *Roadway Express* opinion, but relied upon its earlier decision in *Baynes v. AT&T Technologies, Inc.*, 976 F.2d 1370 (11th Cir. 1992), *reh'g denied*, 29 F.3d 643 (11th Cir. 1994), to find that the Civil Rights Act of 1991 did not retroactively overrule *Patterson*. *Vance*, 983 F.2d at 1577-78. Petitioner argues that the Eleventh Circuit's reliance on *Baynes* results in a "manifest injustice" to Petitioner. *See* Petition at 7-8. According to Petitioner,

> two decisive differences [exist] between *Baynes* and the current case. First, unlike *Baynes*, this case was tried on the basis of the pre-*Patterson* state of the law and affirmance would uphold, rather than upset, the district court's judgment. . . . Secondly, the twice-proven racial

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[4] *See Roadway Express*, 114 S. Ct. at 1513, 1518-19; Civil Rights Act of 1991, Pub. L. No. 102-166, § 402.

> harassment and discrimination was illegal when it occurred in 1985, and at all other times since then. . . .

Petition at 7 (citing *Vance*, 983 F.2d at 1578, 1579 n.3 (Fay, J., concurring)).

Contrary to Petitioner's arguments, § 1981 – as originally enacted – did not encompass Petitioner's racial harassment, discriminatory denial of transfer, and constructive discharge claims against Southern Bell. *See Patterson*, 491 U.S. at 176. Indeed, § 1981 prohibited such conduct only after enactment of the Civil Rights Act of 1991, which does not apply retroactively to claims arising before November 21, 1991. *See Roadway Express*, 114 S. Ct. at 1513, 1519.

Because neither of the two asserted "decisive differences" between *Baynes* and this case exists, the Eleventh Circuit clearly did not commit any "manifest injustice" in relying upon *Baynes*. The *Vance* court properly refused to apply the 1991 Act retroactively to overrule *Patterson* and salvage Petitioner's § 1981 claims.

E. The decision of the Eleventh Circuit in *Vance* does not result in any "manifest injustice" to Petitioner.

Although Petitioner may have had a valid claim under Title VII, *see Patterson*, 491 U.S. at 180-81, she chose instead to sue Southern Bell only under § 1981. Petitioner cannot now avoid the effect of her decision by asserting that proper interpretation and application of the law results in "manifest injustice" and deprives her of any legal remedy. Petition at 5-8. As this Court recognized in *Roadway Express*,

> The essence of judicial decision-making – applying general rules to particular situations – necessarily involves some peril to individual expectations because it is often difficult to predict the precise application of a general rule until it has been distilled in the crucible of litigation.

114 S. Ct. at 1519.

F. Because the Eleventh Circuit correctly decided *Vance*, this Court should not exercise its discretionary jurisdiction to review the decision.

Petitioner fails to demonstrate any compelling reason justifying this Court's discretionary review of *Vance*. Petitioner's argument that the "statutory nullification" of *Patterson* required the Eleventh Circuit to rely upon the "pre-*Patterson* prohibition of racial harassment" lacks merit, for

> *Patterson* provides the authoritative interpretation of the phrase "make and enforce contracts" in the Civil Rights Act of 1866 before the 1991 amendment went into effect on November 21, 1991.

Roadway Express, 114 S. Ct. at 1519. The Eleventh Circuit properly ruled that § 1981 – as originally enacted and as interpreted by the Court in *Patterson* – did not encompass Petitioner's racial discrimination and harassment claims. The decision reached by the *Vance* court is consistent with recent decisions of this Court, and does not demonstrate any "special and important reasons" for discretionary review. Sup. Ct. R. 10.1.

III. THE ELEVENTH CIRCUIT'S RETROACTIVE APPLICATION OF *PATTERSON* TO BAR PETITIONER'S § 1981 CLAIMS DOES NOT DEPRIVE PETITIONER OF HER CONSTITUTIONAL RIGHTS OF DUE PROCESS OR TRIAL BY JURY.

According to Petitioner, the Eleventh Circuit's retroactive application of *Patterson* leaves her without a legal remedy, thereby depriving Petitioner of her constitutional guarantees of due process and trial by jury. Petition at i, 5-8. Yet not only does the Petition fail to demonstrate exactly *how* Petitioner has been denied any of her constitutional rights, consideration of relevant case law interpreting the Fifth and Seventh Amendments provides no support for Petitioner's arguments.

Petitioner asserts throughout her Petition that she relied upon the "pre-*Patterson* prohibition of racial harassment," as if to suggest that the denial of her § 1981 claims deprives her of vested property rights under the Fifth Amendment. *See* Petition at 5-8. Yet neither the Supreme Court (in deciding *Patterson*) nor the Eleventh Circuit (in applying *Patterson* to the facts of this case) has violated Petitioner's Fifth Amendment due process rights. Courts remain free to change interpretations of statutes and rules,[5] for "[n]o person has a vested interest in any rule of law, entitling him to insist that it shall remain unchanged for his benefit." *New York Central R.R. v. White*, 243 U.S. 188, 198 (1917). And because Petitioner does not have a vested property interest in her claim for damages,[6] the Eleventh Circuit's application of the *Patterson*

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[5] *See Eddings v. Volkswagenwerk*, 835 F.2d 1369, 1374 (11th Cir.), *cert. denied sub nom., Griffin v. Ford Motor Co.*, 488 U.S. 822 (1988).

[6] *See Jefferson Disposal Co. v. Parish of Jefferson*, 603 F. Supp. 1125, 1137 (E.D. La. 1985); *see also Hammond v. United States*, 786

rule does not deprive Petitioner of her due process rights.[7] An appellate court "must apply the law in force at the time of its decision, even if it is hearing the case on appeal from a judgment entered pursuant to a prior law." *Hammond v. United States*, 786 F.2d 8, 12 (1st Cir. 1986) (citing *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801));[8] *accord Bradley*, 416 U.S. 696, 714 (1974).

Nor does the statutory revision of § 1981 in any way deny Petitioner's constitutional due process rights. Congress – as well as the courts – may create new rights, for

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F.2d 8, 12 (1st Cir. 1986) ("rights in tort do not vest until there is a final, unreviewable judgment"); *Ducharme v. Merrill-National Laboratories*, 574 F.2d 1307, 1309 (5th Cir.), *cert. denied*, 439 U.S. 1002 (1978) ("a plaintiff has no vested right in any tort claim for damages under state law").

[7] In *Lustgarden v. Gunter*, the federal district court found that the due process clause

> does not prohibit retrospective application of a judicial decision interpreting a [criminal] statute if it was sufficiently foreseeable to a defendant that the interpretation could have applied to that defendant's case.

779 F. Supp. 500, 502 (D. Colo. 1991), *aff'd*, 966 F.2d 552 (10th Cir. 1992); *accord Lerner v. Gill*, 751 F.2d 450, 457 (1st Cir.), *cert. denied*, 472 U.S. 1010 (1985); *see also Bouie v. Columbia*, 378 U.S. 347, 353-55 (1964).

[8] In *Schooner Peggy* the Supreme Court explained:

> It is in the general true that the province of an appellate court is only to inquire whether a judgment when rendered was erroneous or not. But if, subsequent to the judgment, and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied.

5 U.S. (1 Cranch) at 110.

> [t]he guarantees of due process do not forbid the creation of new causes of action or the abolition of old ones to obtain permissible legislative objectives.

Security Homestead Ass'n v. W.R. Grace & Co., 743 F. Supp. 456, 459 (E.D. La. 1990) (citing *Silver v. Silver*, 280 U.S. 117, 122 (1929)).

Petitioner also contends that, in retroactively applying *Patterson* (despite its asserted "statutory nullification"), the Eleventh Circuit has denied Petitioner "her Seventh Amendment guarantee of trial by jury." Petition at 6-8. Neither the language of the Seventh Amendment nor case law interpreting the Constitution supports Petitioner's conclusion.

The Seventh Amendment – which provides that "no **fact** tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of common law," U.S. Const. amend. VII (emphasis added) – does not preclude an appellate court from determining whether the governing rules of federal law have been properly applied to the facts. *See, e.g., New York Times Co. v. Sullivan*, 376 U.S. 254, 286 n.26 (1964). In *Vance* the Eleventh Circuit considered the following issues:

> First, whether the district court erred by refusing to apply *Patterson* retroactively; and second, whether the Civil Rights Act of 1991 overrules *Patterson* retroactively.

983 F.2d 1573, 1575. Upon its review of these two questions of law, the *Vance* court found that the lower court had not properly applied the governing rules of law to the facts of the case. 983 F.2d at 1575. Such a limited scope

of review is well within the bounds of the Seventh Amendment, and in no way deprives Petitioner of her right to trial by jury.

IV. PETITIONER FAILS TO DEMONSTRATE THAT THE ENTRY OF THE DIRECTED VERDICT ON HER STATE LAW TORT CLAIM DEPRIVES HER OF HER SEVENTH AMENDMENT RIGHTS.

Finally, Petitioner argues that because the Eleventh Circuit "erroneously affirmed the district court's directed verdict" on her state law tort claim, she has been deprived of her Seventh Amendment rights to trial by jury. Petition at 8-9. Again, Petitioner fails to demonstrate a single compelling reason for the exercise of this Court's discretionary review, especially in light of the great deference to be accorded to the lower federal courts' interpretations of state law.

The Petitioner does not even mention – much less try to overcome – the "great deference" usually given by the Supreme Court to the "interpretation and application of state law by the courts of appeals." *See Pembaur v. City of Cincinnati*, 475 U.S. 469, 484 n.13 (1986). Indeed, as this Court noted in *Regents of University of Michigan v. Ewing*,

> [W]e are hesitant to overrule decisions by federal courts skilled in the law of particular states unless their conclusions are shown to be unreasonable.

474 U.S. 214, 223 n.10 (1985).

Petitioner has not shown any reason why this Court should not give its usual deference to the Eleventh Circuit's interpretations of state law. The Eleventh Circuit, of

course, frequently decides questions of Florida law; Florida is by far the most populous of the states within the Circuit, with numerous divisions of the federal district courts located throughout the state. The Eleventh Circuit's capacity to interpret questions of Florida law correctly is demonstrated by the thoroughness with which the Eleventh Circuit discusses and applies the Florida cases cited in *Vance*. *See* 983 F.2d at 1575 n.7.

Moreover, the Eleventh Circuit accurately interpreted Florida law. *See Vance*, 983 F.2d at 1575 n.7. In ruling that the federal district court properly dismissed the state law claim, the *Vance* court discussed a number of Florida decisions, each of which clearly supported its conclusion. *Id.* Although the Petitioner asserts that the directed verdict deprives her of her constitutional rights to trial by jury, apparently she does not disagree with the Eleventh Circuit's interpretation of Florida law. *See* Petition at 9.

The Federal Rules of Civil Procedure require that a trial court find that "there is no legally sufficient evidentiary basis for a reasonable jury to find for that party" before directing a verdict. Fed. R. Civ. P. 50(a). Entry of a directed verdict, then, necessarily does not interfere with an individual's Seventh Amendment right to trial by jury, for the Constitution requires only that bona fide issues of *fact* be submitted to the jury. *See* U.S. Const. amend. VII; *see also Sengupta v. Morrison-Knudsen Co.*, 804 F.2d 1072, 1077 n.3 (9th Cir. 1986) (summary judgment).

Petitioner's Seventh Amendment right to trial by jury has not even been implicated by entry of the directed verdict, much less "wrongfully deprived." Petition at 9.

The Eleventh Circuit agreed with the federal district court that the conduct alleged by Petitioner did not support a claim for intentional infliction of emotional distress under the law of Florida. *Vance*, 983 F.2d at 1575 n.7. Having made the proper findings under Rule 50, neither the federal district court nor the Eleventh Circuit has precluded a jury's consideration of bona fide issues of fact.

Therefore, the entry of the directed verdict clearly has not violated Petitioner's Seventh Amendment rights to trial by jury. *See, e.g., Cox v. City of Freeman*, 321 F.2d 887, 891 (8th Cir. 1963); *see also Sengupta*, 804 F.2d at 1077 n.3 (summary judgment). As the Eighth Circuit concluded in *Cox*,

> This argument is not legally nor practically sound. A directed verdict does not deprive the plaintiff of any right guaranteed to . . . [her] by the Seventh Amendment to the United States Constitution.

321 F.2d at 891.

CONCLUSION

For all the foregoing reasons, the Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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